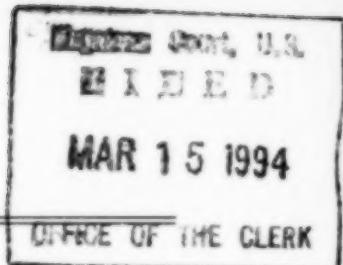


No. 93-714



In The  
**Supreme Court of the United States**  
**October Term, 1993**

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U.S. BANCORP MORTGAGE COMPANY,

*Petitioner,*

v.

BONNER MALL PARTNERSHIP,

*Respondent.*

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On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

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**MEMORANDUM OF RESPONDENT SUGGESTING  
THAT THE CASE IS MOOT**

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BARBARA BUCHANAN  
JOHN FORD ELSAESSEN, JR.  
*Counsel of Record*

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*Counsel for Respondent*

Bonner Mall Partnership, the Respondent in the above-captioned case files this memorandum to advise the Court of certain facts which render this cause moot.

The question presented in this case is as follows:

Whether the new value exception to the absolute priority rule survived enactment of the Bankruptcy Reform Act of 1978, permitting the debtor in the Chapter 11 bankruptcy case to confirm a nonconsensual plan of reorganization that allows the debtor's equity holders to retain ownership of the reorganized debtor while paying objecting creditors less than the full amount of their claims.

On January 7, 1994, the Petitioner, U.S. Bancorp Mortgage Company and the Respondent, Bonner Mall Partnership, reached a tentative settlement of this case subject to certain conditions to be performed by Bonner Mall Partnership and its partners. This Court granted its Writ of Certiorari on January 10, 1994.

The Bonner Mall Partnership and its partners performed its required obligations, and on March 2, 1994, U.S. Bancorp and Bonner Mall Partnership stipulated to the confirmation of a consensual plan of reorganization, which also received the consent of all other creditors.

On March 10, 1994, the United States Bankruptcy Court for the District of Idaho entered an Order Confirming Chapter 11 Plan. A true copy of this Order is attached hereto as Exhibit "A". The plan confirmed by this Order, Bonner Mall Partnership's Third Amended Plan of Reorganization is attached hereto as Exhibit "B".

The confirmed Plan of Reorganization, stipulated to by Petitioner and Respondent, does not involve or address issues under 11 U.S.C. § 1129(b). No questions involving the "new value exception" to the absolute priority rule are raised by the stipulated plan of reorganization, which, in any case, was consented to by all creditors.

The Respondent and the Petitioner having settled all matters at issue between them, and there no longer being an issue concerning the new value exception or a nonconsensual plan of reorganization, it is respectfully suggested that the case is moot, and should be dismissed pursuant to Rule 46 of the Rules of the Supreme Court of the United States.

Respectfully submitted this 14th day of March, 1994.

JOHN FORD ELSAESSER, JR.,  
Attorney for Respondent  
BONNER MALL PARTNERSHIP

#### EXHIBIT A

Ford Elsaesser  
Barbara Buchanan  
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#### UNITED STATES BANKRUPTCY COURT DISTRICT OF IDAHO

In Re:	)	Case No. 91-00801
BONNER MALL	)	ORDER CONFIRMING
PARTNERSHIP	)	CHAPTER 11 PLAN
Debtor.	)	
<hr/>		

The Third Amended Plan of Reorganization filed with this court on March 10, 1994, having been transmitted to creditors and equity security holders and:

1. The plan having been accepted in writing or in open court on the record by the creditors and equity security holders whose acceptance is required by law; and
2. The provisions of Chapter 11 have been complied with; the plan has been proposed in good faith and not by any means forbidden by law; and
3. (i) Each holder of a claim or interest has accepted the plan or will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the amount that such holder would receive or

retain if the debtor were liquidated under Chapter 7 of the code on such date, or (ii) the plan does not discriminate unfairly, and is fair and equitable with respect to each class of claims or interest that is impaired under, and has not accepted the plan; and

4. All payments made or promised by the debtor or by a person issuing securities or acquiring property under the plan or by any other person for services or for costs and expenses in, or in connection with, the plan and incident to the case, have been fully disclosed to the court and are reasonable or, if to be fixed after confirmation of the plan, will be subject to approval of the court; and

5. The identity, qualifications, and affiliations of the persons who are to be directors or officers, if any, of the debtor after confirmation of the plan have been fully disclosed, and the appointment of such persons to such offices, or their continuance therein, is equitable, and consistent with the interests of the creditors and equity security holders and with public policy; and

6. The identity of any insider that will be employed or retained by the debtor and his compensation have been fully disclosed; and

7. Confirmation of the plan is not likely to be followed by the need for further financial reorganization of the debtor.

IT IS HEREBY ORDERED that the Third Amended Plan of Reorganization is confirmed with the following modifications in regard to the treatment of creditors U.S. Bancorp, D. L. Evans Bank, and First Security Bank as set

forth in the stipulations executed by Debtor and those creditors and filed herewith.

1. U.S. Bancorp. The final sentence of the second full paragraph on page 11 of the Third Amended Plan of Reorganization is modified to read as follows:

"This reserve account shall be held in interest-bearing account by the property manager of the Bonner Mall at U.S. Bank."

The last line of the third full paragraph on page 11 of the Third Amended Plan of Reorganization should read as follows:

"However, nothing in the agreement by U.S. Bank to accept treatment under the Plan, or in any of the agreements between U.S. Bank, the debtor, and the guarantors, shall be construed to release, waive, or impair the claim that U.S. Bank has against the original Northtown Partners, including Lloyd Andrews, based upon the guaranties of said partners or applicable partnership law."

2. D. L. Evans Bank. Paragraph 5.3.5.1 located at page 16 of the Third Amended Plan of Reorganization should be modified to change the amount of monthly cash to D. L. Evans Bank from \$3,851.00 to \$3,581.10 and to change the interest rate from seven percent per annum to a variable rate of two percent over the prime rate as published in the Wall Street Journal. In addition, the following language should be included:

"D.L. Evans Bank shall continue to retain the guaranty of H.F. Magnuson and any security pledged as security for such guaranty until such

time as debtor's obligations under the Note are paid in full."

3. First Security Bank. Paragraph 5.3.2.1 dealing with the treatment of the Class 2b Creditor, First Security Bank should be modified to provide as follows:

5.3.2.1 The holder of the Class 2b claim, First Security Bank, N.A. ("First Security") is fully secured and should be treated as follows:

Debtor is obligated to First Security under two promissory notes ("the Notes"), Note No. 00026 and Note No. 0018. The Notes have a maturity date of September 15, 1995.

Debtor shall continue to make payment to First Security on a monthly basis in accordance with the terms and conditions of the Notes. These payments are Note No. 00026: Five Thousand Four Hundred Dollars (\$5,400.00); and Note No. 0018 One Thousand Thirty Two and 19/100 Dollars (\$1,032.19) per month. The payments will be made on or before the fifteenth day of each month to and until September 15, 1995 at which time all principal, accrued interest and costs then outstanding shall be due and payable.

First Security shall continue to retain its first deed of trust on the unimproved property adjacent to the Bonner Mall (the "Subject Property"). Nothing herein shall be deemed to impair or otherwise restrict the lien of First Security's deed of trust. First Security acknowledges that debtor may grant US Bank a second deed of trust on the Subject Property. First Security hereby consents to debtor's grant of lien to US Bank which is junior and subordinate to First Security's deed of trust on the Subject Property.

First Security shall continue to retain the guaranties of H.F. Magnuson and Lloyd Andrews, and any security pledged as security for such guaranties until such time as debtor's obligations under the Notes are paid in full.

Upon default of any of debtor's obligation to make payment under either of the Notes, payment of real property taxes, insurance, or other provisions of the deed of trust in favor of First Security, which default remains uncured for a period of thirty (30) days, First Security shall be entitled to immediately initiate proceedings to foreclose its deed of trust without obtaining the consent of the bankruptcy court.

Debtor agrees that First Security may add the cost of any real property appraisal which it is required by regulation to obtain, to the principal balance of the Notes. The cost of any such appraisal(s) shall be payable upon maturity of the Notes, September 15, 1995.

Debtor acknowledges and agrees that First Security is a fully secured creditor and pursuant to 11 USC Section 506(b) and the terms and conditions of its deed of trust and Notes is entitled to reimbursement of its attorney's fees and costs incurred in this bankruptcy proceeding. First Security shall add the amount of its attorney's fees and costs to the principal balance of the Notes and such sum shall be payable upon maturity of the Notes, September 15, 1995.

Guarantors shall provide to First Security within ninety (90) days from the end of each calendar year copies of their personal financial statements (balance sheet, income statement and income tax returns) prepared in accordance with

generally accepted accounting standards consistently applied in a form acceptable to First Security. Debtor shall provide copies of its company prepared monthly financial statements, to First Security within fifteen (15) days from the end of each month and a copy of its annual financial statements prepared in accordance with generally accepted accounting standards consistently applied, within ninety (90) days after year end.

DATED this 10 day of March, 1994.

/s/ Alfred C. Hagan  
Alfred C. Hagan  
U.S. Bankruptcy Judge

Presented by:

/s/ Ford Elsaesser  
Ford Elsaesser, Attorneys for  
Debtor-in-Possession

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(208) 263-8517

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF IDAHO**

In Re:	)	Case No. 91-00801
BONNER MALL	)	THIRD AMENDED
PARTNERSHIP,	)	PLAN OF
Debtor.	)	REORGANIZATION
_____		

Bonner Mall Partnership, an Idaho general partnership, the Debtor in the above-captioned Chapter 11 case, proposes the following Plan of Reorganization pursuant to Subchapter II of Chapter 11 of the Bankruptcy Code:

**ARTICLE I**  
**DISCLOSURE STATEMENT**

1. The Debtor has filed a Disclosure Statement pursuant to 11 U.S.C. § 1125 and Bankruptcy Rule 3016(c). The Disclosure Statement has been approved by the Bankruptcy Court prior to this Plan being submitted to creditors and equity security holders. The Disclosure Statement provides useful information to aid and assist creditors and equity security holders in voting on the Plan. YOU ARE URGED TO READ THE DISCLOSURE

**STATEMENT WITH CARE IN EVALUATING THE  
IMPACT OF THE PLAN UPON YOUR CLAIMS OR  
EQUITY SECURITY INTERESTS.**

**ARTICLE II  
DEFINITION OF TERMS**

2. A term used in this Plan that is not defined below and that is defined in the Bankruptcy Code shall have the meaning ascribed in the Bankruptcy Code. When used in this Plan, the following terms shall have the meanings specified below, unless the context otherwise requires:

2.1 **ALLOWED CLAIM:** Any claim in the amount and of the priority classification set forth in the proof of such claim that has been filed timely in the Reorganization Case, or in the absence of such proof, as set forth in the Debtor's schedules of liabilities filed in the Reorganization case, unless: (i) such claim has been listed in such schedules as disputed, contingent, or unliquidated, in which case such claim shall be allowed only in such amount and such classification as is authorized by Final Order of the Bankruptcy Court; (ii) such claim has been objected to or is objected to after Confirmation, in which case such claim shall be allowed only in such amount and such classification as if authorized by Final Order of the Bankruptcy Court; or, (iii) such claim has been paid in full, withdrawn, or otherwise deemed satisfied in full.

2.2 **ALLOWED INTEREST:** Any Equity Interest in the amount and of the priority classification set forth in the proof of such Equity Interest that has been filed timely in the Reorganization Case, or in the absence of

such proof, as set forth in the debtor's listings and schedules filed in the Reorganization Case, unless: (i) such Equity Interest has been objected to or is objected to after confirmation, in which case such Equity Interest shall be allowed only in such amount and such classification as is authorized by Final Order of the Bankruptcy Court; or (ii) such Equity Interest has been paid in full, withdrawn, or otherwise deemed satisfied in full or retired.

2.3 **AS SOON AS PRACTICABLE:** Unless extended by court order, within thirty days following the occurrence of a triggering event.

2.4 **BANKRUPTCY CODE or CODE:** The Bankruptcy Code enacted November 6, 1978, as set forth in Title 11 of the United States Code, and as amended thereafter.

2.5 **BANKRUPTCY COURT or COURT:** The United States Bankruptcy Court for the District of Idaho, before which the Reorganization Case is pending, or if that Court ceases to exercise jurisdiction over the Bankruptcy Case, the Court that does exercise jurisdiction.

2.6 **CLASS:** A class of claims or equity security interests as defined in Article III of this Plan.

2.7 **CLASS 3 CLAIMS ORDER:** The order of the Bankruptcy Court making specific reference to this Plan which fixes and liquidates the amount of all Class 3 claims.

2.8 **CONFIRMATION:** The entry of the Order of Confirmation by the Bankruptcy Court.

2.9 **DEBTOR:** Bonner Mall Partnership, an Idaho partnership.

2.10 DISPUTED CLAIM: A filed or scheduled claim of an alleged creditor as to which an objection has been filed by a party in interest.

2.11 EFFECTIVE DATE: A date eleven days after Confirmation unless the effect of the Order of Confirmation is stayed under Bankruptcy Rule 8005.

2.12 ESTATE: The Estate created pursuant to § 541 of the Bankruptcy Code.

2.13 FINAL ORDER: An order of the Bankruptcy Court confirming the Plan pursuant to Section 1129 of the Bankruptcy Code.

2.15 PETITION DATE: March 13, 1991, the date upon which the Debtor filed the Chapter 11 Petition commencing the Reorganization Case.

2.16 PLAN: This Plan of Reorganization in its present form or as it may be amended or modified from time to time pursuant to order of the Bankruptcy Court.

2.17 PROFESSIONAL PERSONS: Persons retained or to be compensated pursuant to §§ 326, 327, 328, 330 and/or 1103 of the Bankruptcy Code.

2.18 PRO RATA: Proportionally so that the ratio of the amount distributed on account of a particular Allowed Claim to the amount of such Allowed Claim is the same as the ratio of the amount distributed on account of all Allowed Claims in the Class of which such particular Allowed Claim is a member to the total amount of all Allowed Claims in such Class.

2.19 REORGANIZATION CASE: Chapter 11 case pending before the Bankruptcy Court commenced by the Debtor, designated Case No. 91-00801.

2.20 REORGANIZED DEBTOR: As provided by § 1141(b) of the Bankruptcy Code, Bonner Mall Partnership, an Idaho general partnership as reconstituted, in accordance with the provisions of this Plan following the Effective Date, with assets that were formerly property of the Estate.

2.21 SECURED CLAIM: An Allowed Claim that is a secured claim against the Debtor determined in accordance with §§ 506 and 552 of the Bankruptcy Code.

2.22 UNCLASSIFIED CLAIM: An Allowed Claim described in § 507(a)(1), (2) or (7) of the Bankruptcy Code and any fees payable pursuant to 28 U.S.C. § 1930.

2.23 UNSECURED CLAIM: An Allowed Claim that is not a Secured Claim.

### ARTICLE III

#### CLASSIFICATION OF CLAIMS AND INTERESTS

3. All claims, as defined in § 101(5) of the Bankruptcy Code, against the Debtor and all equity security interests, as defined in § 101(16) of the Bankruptcy Code, in the Debtor are classified as set forth herein. A claim or interest is in a particular Class only to the extent it qualifies within the definition of such Class and is in a different Class to the extent it qualifies within the definition of such different Class.

**3.1 Priority Claims:**

**3.1.1 Class 1:** All Allowed Claims against the Debtor entitled to priority pursuant to § 507(a)(3) of the Bankruptcy Code.

**3.2 Secured Claims:**

**3.2.1 Class 2a:** The Secured Claim of U. S. Bank, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

**3.2.2 Class 2b:** The Secured Claim of First Security Bank, formerly First National Bank of North Idaho, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

**3.2.3 Class 2c:** The Secured Claim of Panhandle State Bank, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

**3.2.4 Class 2d:** The Secured Claim of Triangle Development, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

**3.2.5 Class 2e:** The Secured Claim of D. L. Evans Bank, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

**3.3 Unsecured Claims.**

**3.3.1 Class 3a:** All Allowed Claims against the Debtor, however arising, not entitled to priority and not

otherwise included in any other Class hereof, including, without limitation, claims based upon the rejection of executory contracts or unexpired leases.

**3.3.2 Class 3b:** Any Allowed Claims of Lloyd Andrews, H. F. Magnuson and the Debtor's partners which are not Unclassified Claims, which are not entitled to priority and which are not otherwise included in any other Class hereof.

**ARTICLE IV****CLAIMS AND INTERESTS NOT  
IMPAIRED BY THE PLAN**

4. The Allowed Claims in Class 1 are not impaired under the Plan.

**ARTICLE V****PROVISIONS FOR SATISFYING CLAIMS  
AND SPECIFYING TREATMENT OF  
EACH CLASS UNDER THE PLAN**

5. The treatment of all Allowed Claims and Allowed Interests are specified as follows:

**5.1 Unclassified Claims:** Unclassified Claims, upon allowance by the Court will be paid as follows:

**5.1.1** Each holder of an Allowed Claim entitled to priority pursuant to § 507(a)(1) of the Code shall receive, from the Reorganized Debtor, as soon as practicable following the later of (a) the Effective Date of (b) the date upon which an order of the Court allowing such claim becomes a Final Order, cash in the amount of such

Allowed Claim unless the holder of such Unclassified Claim agrees to different treatment, except for certain ordinary course of business Unclassified Claims, the treatment of which is specified in Paragraph 5.1.2 below; provided that all fees payable pursuant to 28 U.S.C. § 1930 shall be paid prior to or on the Effective Date.

5.1.2 Unclassified Claims incurred by the Debtor during the pendency of the case shall be assumed and paid in the ordinary course of business by the Reorganized Debtor after the Effective Date.

5.1.3 Allowed Claims of governmental units entitled to priority pursuant to § 507(a)(7) of the Code and not otherwise included in any other Class hereof shall be paid by the Reorganized Debtor in twelve (12) equal quarterly cash payments commencing on the final day of the first full fiscal quarter of the Reorganized Debtor following the later of (a) the Effective Date or (b) the date upon which an order of the Court allowing such claim becomes a Final Order, and amortized with interest over such twelve quarter period. The amortization shall be based on simple interest at a rate equal to seven percent (7%) per annum unless the Court establishes, after notice and a hearing, a different market rate of interest. Any holder of a claim entitled to priority under § 507(a)(7) shall, within the same deadline and in the same manner established for objections to confirmation, file any objection it may have to the proposed interest rate, identify the proposed alternative rate, and set forth the facts and circumstances justifying such rate. Failure to object to the proposed interest rate shall be deemed to be a consent thereto. The holder of an Allowed Claim entitled to priority pursuant to § 507(a)(7) of the Code shall not be

entitled to receive any payment on account of any Post-Petition Date penalty or interest with respect to or arising in connection with its claim; and any such claim or demand for Post-Petition Date penalties or interest shall be discharged by Confirmation of this Plan under 1141(d)(1) of the Code, and the holder of such claims shall not assess or attempt to collect such penalty or interest from the Reorganized debtor. As of the date of this Second Amended Plan of Reorganization, the Debtor is unaware of any past due, unpaid, or delinquent claims that would fit under this category.

### *5.2 Priority Claims:*

5.2.1 *Class 1:* Class 1 claims are not impaired under this Plan. Each holder of a Class 1 Allowed Claim shall be paid the entire amount of such holder's Allowed Claim by the Reorganized Debtor on the later of (a) the Effective Date or (b) the date upon which an order of the Court allowing such claim becomes a Final Order.

### *5.3 Secured Claims:*

5.3.1 *Class 2a:* The holder of the Class 2a claim is impaired under this Plan. Unless the Reorganized Debtor and the holder of the Class 2a claim otherwise agree to alternative treatment of the claim, the Class 2a Claim shall be satisfied in the manner described in Paragraph 5.3.1.1 below, or if U. S. Bank properly elects application of § 1111(b) of the Bankruptcy Code, then the Class 2a claim shall be satisfied in the manner described in Paragraph 5.3.1.2 below.

5.3.1.1. U. S. Bank, the holder of the Secured Claim constituting the Class 2a claim, shall upon confirmation

make a new loan to the Partnership in the amount of \$4.3 million dollars. The loan shall carry interest at the rate of 8.75 percent per annum and shall be payable over five (5) years with monthly payments of principal and interest based on a twenty five (25) year amortization.

The debtor or its guarantors shall provide a "take out" commitment for permanent financing to U.S. Bank by the forty-ninth month of the term of the loan. The new loan shall act as payment of the secured claim of U.S. Bank in the amount of 3.2 million dollars and the loan made by U.S. Bank to H.F. Magnuson and Lloyd Andrews for the expansion of Yoke's Pac 'n' Save, commonly referred to as the "\$905,000" loan, in the amount of 1.1 million dollars. The law suit in the First Judicial District of the State of Idaho, in and for Bonner County (hereinafter "Bonner County District Court") between U.S. Bank, H.F. Magnuson, and Lloyd Andrews, Case No. CV 92-01127, shall be dismissed, with prejudice, with each party bearing its own attorney fees and costs. In addition U.S. Bank will agree to dismiss its claims against Yoke's Washington Foods, Inc. filed in the Bonner County District Court, as Case No. CV 92-01332.

To secure the new loan in the amount of 4.3 million dollars, U.S. Bank shall receive a first position security interest in the Bonner Mall property it currently holds as collateral, with an assignment of all rents. In addition, the loan shall have as additional collateral the 4100 acres commonly referred to as the "Athol" property owned by H. F. Magnuson. Further, U.S. Bank shall have as additional collateral a first position deed of trust on the residence of Lloyd Andrews. In addition, the Bank shall be granted a junior lien on property owned by the debtor

adjacent to Bonner Mall, secured by a first lien to First Security Bank. U.S. Bank will agree to release said lien on this parcel only, to the extent justified by commercially reasonable development of said parcel.

For the entire amount of the new loan of 4.3 million dollars, U.S. Bank shall receive the personal guaranty of H. F. Magnuson and of Lloyd Andrews.

The Bonner Mall Partnership shall keep a reserve account with a minimum balance of no less than \$100,000, for unanticipated expenses and repairs. Should this fund need to be drawn down, it shall be brought back up to a \$100,000 balance within thirty days of such draw down. This reserve account shall be held in an interest-bearing account by the property manager of the Bonner Mall.

U.S. Bank shall receive no payment upon its unsecured deficiency claim. However, nothing in the agreement by U.S. Bank to accept treatment under the Plan, or in any of the agreements between U.S. Bank, the debtor, and the guarantors, shall be construed to release, waive, or impair the claim that U.S. Bank has against the original Northtown Partners, based upon the guaranties of said partners or applicable partnership law.

At the expense of debtors, separate and apart from the 4.3 million dollar loan, U.S. Bank will order a MAI appraisal of the "Athol" property and the residence of Lloyd Andrews.

Upon the default in the payment of any monthly payments provided for under the new loan, the payment of real estate taxes, personal property taxes, insurance, or compliance with the provision of obtaining take out

financing by the forty-ninth month of the term of the loan, or debtor's failure to provide additional collateral as may be required by U.S. Bank as provided hereafter, U.S. Bank upon thirty day written notice of default to the debtor, shall be entitled to the following relief:

- a. Immediate possession of the Bonner Mall property;
- b. Title, via previously executed deeds signed by the parties and held by counsel for U.S. Bank, to the Bonner Mall properties;
- c. All rental accounts and ongoing rental payments; and,
- d. A bankruptcy court order approving the conveyance of property to U.S. Bank free and clear of all liens.

The default rate upon the promissory note evidencing the new loan shall be the note rate plus eight percent. A late charge will be charged upon any payment not paid within ten days of its due date, in an amount equal to ten percent of the amount not paid.

The new loan shall be evidenced by U.S. Bank's standard loan documents. U.S. Bank will obtain appraisals on all collateral pledged for the loan as set out above. The selection of appraisers shall be made by U.S. Bank as required by FIRREA. The loan shall close before the appraisals are complete. Mr. Magnuson and Mr. Andrews will provide evidence to the Bank's satisfaction as to the values of the collateral pledged for the new loan. If after the appraisals are completed, the loan to value is more than 65%, the debtor, Mr. Magnuson and Mr.

Andrews agree to provide additional collateral to reduce the loan to value percentage to 65% or less.

Mr. Magnuson and Mr. Andrews will provide current personal financial statements which are satisfactory to U.S. Bank. In addition, Mr. Magnuson and Mr. Andrews will provide, on an annual basis, updated personal financial statements which are satisfactory to the Bank within ninety days of the calendar year-end. The debtor will provide monthly financial statements within fifteen days of each calendar month and an annual financial statement within ninety days of the calendar year-end for the mall which are satisfactory to the Bank.

Finally, at the closing of the loan, Mr. Magnuson and Mr. Andrews will pay a loan fee of \$43,000.00.

**5.3.2 Class 2b:** The holder of the Class 2b claim is impaired under this Plan. Unless the Reorganized Debtor and the holder of the Class 2b claim otherwise agree to alternative treatment of the claim, the Class 2b claim shall be satisfied in the manner described in Paragraph 5.3.2.1 below, or if First Security Bank, formerly First National Bank of North Idaho, properly elects application of § 1111(b) of the Bankruptcy Code, then the Class 2b claim shall be satisfied in the manner described in Paragraph 5.3.2.2 below.

**5.3.2.1** The holder of the Class 2b claim, First Security Bank, formerly First National Bank of North Idaho (FSB), shall retain its lien securing its claim and shall receive monthly cash payments of \$5600 from the Reorganized Debtor or the guarantors, H.F. Magnuson and Lloyd

Andrews, commencing on the first monthly anniversary of the effective date of the Plan and continuing thereafter until its entire secured claim plus accrued interest is paid in full. Interest shall be calculated at the contract rate.

In the event debtor defaults on the monthly payments provided for under the Plan, upon 30 days written notice, FSB shall be entitled to exercise all of its state law remedies against the collateral and the guarantors.

5.3.2.2 If the holder of the Class 2b claim is entitled to and does timely make an election under § 1111(b) of the Bankruptcy Code, then First Security Bank shall retain its lien and its entire Allowed Claim, without interest, shall be paid by the Reorganized Debtor in equal monthly installments over a period of time, not less than thirty (30) years in duration, which period shall be set by the Court at the hearing on confirmation so as to result in a valuation of the payments to be made by the Reorganized Debtor, on a present discounted basis, being equal to the holder's Secured Claim. The first payment shall commence on the Effective Date.

5.3.2.3 Pursuant to the provisions of § 1129(b) of the Bankruptcy Code, the Debtor requests that the Court confirm the Plan without the consent of First Security Bank.

5.3.3 *Class 2c:* The holder of the Class 2c claim is impaired under this Plan. The Class 2c claim shall be paid the sum of \$7,000 within thirty days of the effective date, which shall constitute full payment of the secured claim of the Class 2c creditor. The Class 2c creditor will waive any deficiency, which would not in any event exceed \$800.

5.3.4 *Class 2d:* The holder of the Class 2d claim is impaired under this Plan.

5.3.4.1 Triangle Development Company, shall retain its lien securing its claim and shall receive the following payments:

The sum of \$205,000 in cash payable on or before February 20, 1994. A payment of \$45,000 together with interest at the rate of seven percent per annum from January 1, 1994, on or before June 30, 1994. A payment of \$5000, with no interest thereon, as compensation for the lack of payments and compensation for attorney fees and costs, on or before January 31, 1995. In exchange for the above payments and after the receipt of the \$205,000 payment, Triangle will subordinate its interest in the parcel debtor has by separate order, following notice and hearing, leased to Kentucky Fried Chicken.

In the event any of the above payments are not timely made, and after 10 days written notice of default, a deed in lieu of foreclosure, in proper form as approved by the bankruptcy court, will be delivered to Triangle.

5.3.5 *Class 2e:* The holder of the Class 2e claim is impaired under this Plan. Unless the Reorganized Debtor and the holder of the Class 2e claim otherwise agree to alternative treatment of the claim, the Class 2e claim shall be satisfied in the manner described in Paragraph 5.3.5.1 below, or if D. L. Evans Bank properly elects application of § 1111(b) of the Bankruptcy Code, then the Class 2e claim shall be satisfied in the manner described in Paragraph 5.3.5.2 below.

5.3.5.1 D. L. Evans Bank, the holder of the Secured Claim constituting the Class 2e claim, shall retain its lien securing its Secured Claim and shall receive monthly cash payments in an amount equal to \$3,851 until its Allowed Secured Claim together with interest accruing following the Effective Date is paid. The payments shall be made by the Reorganized Debtor and the first payment shall be made on the first monthly anniversary of the Effective Date. For the purposes of this Plan, the Allowed Secured Claim shall be deemed to equal the outstanding principal balance of the claim as of the Effective Date after giving effect to the post Petition Date payments, which is less than the fair market value of the collateral. Interest shall be calculated at the lesser of 7% per annum or the rate specified in the contract between the Debtor and D. L. Evans Bank, or at the rate set by the Bankruptcy Court at confirmation.

5.3.5.2 If the holder of the Class 2e claim is entitled to and does timely make an election under § 1111(b) of the Bankruptcy Code, then D. L. Evans Bank shall retain its lien and its entire Allowed Claim, without interest, shall be paid by the Reorganized Debtor in equal monthly installments over a period of time, not less than thirty (30) years in duration, which period shall be set by the Court at the hearing on confirmation so as to result in a valuation of the payments to be made by the Reorganized Debtor, on a present discounted basis, being equal to the holder's Secured Claim. The first payment shall commence on the Effective Date.

5.3.5.3 Pursuant to the provisions of § 1129(b) of the Bankruptcy Code, the Debtor requests that the Court confirm the Plan without the consent of D. L. Evans Bank.

#### 5.4 Unsecured Claims:

5.4.1 *Class 3a:* Class 3a claims are impaired under this Plan. The holders of Class 3a claims shall be paid the entire amount of their unsecured claim without interest in cash on the first monthly anniversary of the effective date. The Debtor is unaware of any such unsecured claims at this time.

5.4.2 *Class 3b:* The class 3b claims are impaired under the Plan. The holders of the Class 3b claims, the partners and insiders of the Debtor, shall not receive any payment on their claims until such time as the U.S. Bank loan has been taken out by permanent financing and all the remaining claims have been paid in full.

### **ARTICLE VI TREATMENT OF DISPUTED CLAIMS AND INTERESTS**

6. Except as provided in Paragraph 5.4.2 above, all Disputed Claims will be resolved prior to any distributions by the Reorganized Debtor. Equity Security Interests are not entitled to any distributions from the Reorganized Debtor under this Plan.

### **ARTICLE VII MEANS FOR EXECUTION OF THE PLAN**

7. The Debtor, the Estate, and Reorganized Debtor shall each perform or shall have performed all the acts required of them below, (unless the Debtor, the Estate, and the Reorganized Debtor all shall agree to perform

such acts at an earlier time) on the Effective Date of the Plan.

7.1 All assets of the Estate shall be vested in the Reorganized Debtor in accordance with 11 U.S.C. § 1141 and the Reorganized Debtor shall be free to manage its affairs with no further Court intervention, including the lawful manner of selecting directors and officers.

7.2 The Debtor shall assume all responsibility for completing any capital improvements planned during the reorganization period.

7.3 Notwithstanding any provision to the contrary in this Plan, all rights, claims, and causes of action, whether equitable or legal, of the Debtor, the Estate, or the Reorganized Debtor against all persons arising under any provision of the Bankruptcy Code, under state or federal law for the recovery of avoidable fraudulent conveyances or other transfers or under any other State or Federal law, shall be vested in the Reorganized Debtor. During the pendency of the Reorganization Case, prior to or following Confirmation, the Debtor-in-Possession or the Reorganized Debtor may commence adversary proceedings against persons or entities to realize upon any such causes of action. Any settlements shall be subject to review by the Bankruptcy Court, after appropriate notice and hearing in accordance with the Bankruptcy Rules.

7.4 Any objection to a claim by a party in interest in the Reorganization Case must be filed on or before one hundred twenty (120) days following the Effective Date unless said time period is extended by the Bankruptcy

Court for cause shown; provided, however, that the foregoing limitation does not apply to any claims filed subsequent to Confirmation.

7.5 Pursuant to Section 347(b) of the Bankruptcy Code, ninety (90) days after any distribution by the Reorganized Debtor provided for herein, the Reorganized Debtor shall stop payment on any check remaining unpaid to a holder of an Allowed Claim and any funds shall be returned to the Reorganized Debtor. From and after the date the Reorganized Debtor stops payment on any distribution check pursuant to this 7.5, the holder of the claim on account of which such check was issued shall be entitled to receive no further distributions on account of his claim and such holder's Allowed Claim shall thereupon be deemed satisfied in full.

7.6 The deadline for submission of all claims entitled to priority pursuant to Sections 507(a)(1), (a)(2) and (b) of the Bankruptcy Code incurred prior to Confirmation, with the exception of fees and costs of Professional Persons shall be thirty (30) days following Confirmation. Failure to file a claim by this date shall conclusively bar the claimant from asserting his claim, which claim shall be forever discharged.

7.7 Any negotiable instrument held by the holder of an impaired Allowed Claim shall be deemed exchanged, canceled, or satisfied, as the case may be on the Effective Date.

7.8 The Reorganized Debtor shall timely make all payments required under this Plan.

**ARTICLE VIII**  
**EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

8 The treatment of executory contracts and unexpired leases is specified below.

8.1 All executory contracts and unexpired leases of the Debtor not heretofore assumed or rejected, shall be assumed by the Debtor on the Effective Date, except those executory contracts and unexpired leases listed in the "Schedule of Rejected Executory Contracts" which is attached hereto as Exhibit A. Any claim arising from the rejection of an executory contract is a Class 3a claim and, any entity holding a claim based upon the rejection of an executory contract or unexpired lease pursuant to this Article must file a Proof of Claim with the Bankruptcy Court within 30 days after Confirmation. The failure of any such entity to file a Proof of Claim within the specified time period will result in the disallowance of such claim.

8.2 With regard to those executory contracts and unexpired leases which are not listed on Exhibit A, on the Effective Date, or as soon thereafter as is practicable, the Reorganized Debtor shall (a) cure the arrearages, if any, in such amounts as may be determined by the Court at the hearing on Confirmation or thereafter and (b) assume said executory contracts. Any party to an executory contract or unexpired lease scheduled for assumption as provided in this paragraph 8.2 shall, within the same deadline and in the same manner established for objections to confirmation, file any claim for arrearages

required to be cured by Section 365(b)(1) of the Bankruptcy Code and any objections to the assumption. Failure to assert such arrearages or to file any objections shall constitute an agreement to the assumption and an acknowledgment that no defaults or claims exist under said contract which require a cure.

**ARTICLE IX**  
**SATISFACTION OF INDEBTEDNESS AND  
 DISCHARGE OF CLAIMS**

9. The distribution made to the various Classes of creditors as provided for in this Plan shall be in full and complete satisfaction of their Allowed Claims. Except as otherwise provided in the Plan or the Order of Confirmation, Confirmation shall operate, as a discharge of any and all debts and claims as defined in Section 101(4) of the Bankruptcy Code against the Debtor or the Estate that arose at any time prior to Confirmation. The discharge of the Debtor and the discharge of claims against the Debtor, whether asserted against the Debtor or the Reorganized Debtor, shall be effective as to each claim, regardless of whether or not (a) the claim was scheduled, (b) a proof of claim was filed, (c) the claim is an Allowed Claim, or (d) the holder thereof voted to accept the Plan. Provided however, that nothing in this Article shall in any way constitute any waiver or impairment of the claim of U.S. Bank to proceed against other debtors who may be liable on its original obligation.

**ARTICLE X**  
**MODIFICATIONS OF THE PLAN**

10 Pursuant to the provisions of Section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, the Debtor reserves the right to modify or alter the provisions of the Plan at any time prior or subsequent to Confirmation.

**ARTICLE XI**  
**RETENTION OF JURISDICTION BY THE  
BANKRUPTCY COURT**

11 Notwithstanding Confirmation, until entry of a final decree, the Bankruptcy Court shall retain jurisdiction to ensure that the purposes and intent of the Plan are carried out. Without limiting the generality of the foregoing, the Court shall retain jurisdiction for the following purposes:

11.1 Fixing and allowing any claim as a cost and expense of the administration of the Reorganization Case;

11.2 Reexamining any claim that has been allowed;

11.3 Hearing and determining any objection to a claim or interest. The failure of the Debtor to object to, or to examine any claim or equity security interest for the purpose of voting, shall not be deemed to be a waiver of the Debtor's right to object to, or re-examine any claim or equity security interest in whole or in part;

11.4 Hearing and determining any action brought by the Debtor or the Estate seeking to avoid any transfer of an interest of the Debtor in property, or any obligation incurred by Debtor, that is avoidable pursuant to applicable law;

11.5 Hearing and determining all causes of action, controversies, disputes, or conflicts between or among the Debtor and any other party, including those that were pending prior to Confirmation;

11.6 Hearing and determining all questions and disputes regarding title to the property of the Debtor or the Estate;

11.7 Correcting any defect, curing any omission, or reconciling any inconsistency in the Plan or the Order of Confirmation as may be necessary to carry out the purpose and intent of the Plan;

11.8 Hearing and determining any action brought by the Debtor to protect the Debtor and the Estate from actions of creditors, equity security holders, or other parties in interest;

11.9 Issuing any order necessary to implement the Plan or Order of Confirmation, including, without limitation, such declaratory and injunctive orders as are appropriate to protect the Debtor, the Estate, and the Reorganized Debtor from actions of creditors, equity security holders, or other parties in interest;

11.10 Hearing and determining any dispute relating to the terms or implementation of the Plan or Order of Confirmation, or to the rights or obligations of any parties in interest with respect thereto;

11.11 The modification of the Plan after Confirmation pursuant to the Bankruptcy Rules and the Bankruptcy Code in accordance with Article X above; and

11.12 Entering orders concluding and terminating the Reorganization Case.

11.13 To enforce any provisions or agreements between the Debtor and creditors, particularly the Debtor and U.S. Bank, under the default provisions of such agreements as provided herein.

DATED this 9 day of March, 1994.

ELSAESSER, JARZABEK &  
BUCHANAN, CHTD

/s/ Barbara Buchanan  
Barbara Buchanan, Attorney  
for Debtor-in-Possession

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EXHIBIT "A"

SCHEDULE OF REJECTED EXECUTORY CONTRACTS  
AND UNEXPIRED LEASES

<i>Non-Debtor Party</i>	<i>Nature of Agreement</i>
NONE .	

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